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Twenty-fifth session

SUMMARY RECORD OF THE 472nd MEETING

Held at Headquarters, New York,
on Wednesday, 6 May 1992, at 3 p.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

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International payments: draft Model Law on International Credit Transfers (continued)

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The meeting was called to order at 3.15 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

Article 17 (continued)

1. The CHAIRMAN said that there was an issue with regard to article 17 that had yet to be resolved, namely, that of payment orders executed by a receiving bank for amounts less than the amount of the payment order received. He drew attention to article 14, which provided that, in case of underpayment by a receiving bank, the bank was obligated to issue a payment order for the difference between the amounts. There appeared to be a discrepancy between article 14 and article 17 (2), which provided that a credit transfer was completed when the beneficiary's bank accepted the payment order. He wondered whether it might be necessary to clarify article 14, and recalled that, at its previous session, the Commission had agreed to postpone a final decision on the matter until it took up article 17.

2. Mr. LOJENDIO (Spain) said that article 14 left several questions unanswered. For example, it was unclear what remedies were envisaged in the case of a receiving bank which failed to comply with its obligations to send a second payment order. It was also unclear which party was entitled to claim the unpaid amount: the beneficiary or the originator, under the money-back guarantee provided for in article 13.

3. The CHAIRMAN said that, strictly according to the provisions of the Model Law, only the originator would have a right to the funds.

4. Mr. BURMAN (United States of America) said that the options available to the originator were either to seek the enforcement of article 14 under his national procedural law or to claim a refund with interest under article 13.

5. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to leave article 14 unchanged, pending further review of article 17.

6. It was so decided.

7. The CHAIRMAN recalled that, at its twenty-fourth session, the Commission had deferred to the current session a discussion of the possible discrepancy between article 5 (b) (ii) and article 17 (2).

8. Ms. KOSKELO (Observer for Finland) said that it was she who had raised the possibility of a discrepancy. Article 5 defined the moment when payment took place between two banks in the credit-transfer chain; paragraph 5 (b) (ii) envisaged a situation in which payment between the sending bank and the receiving bank took place at a third bank. The conflict

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with article 17 (2) arose from the possibility that the reimbursement transaction was itself a credit transfer which would be governed by the Model Law. While article 17 (2) defined the time of payment as the moment when the third bank accepted the payment order, article 5 (b) (ii) defined it as the business day following the day on which the receiving bank learned that the funds were available. In her view, the conflict could not be resolved in the context of article 17; rather, it was necessary to redraft article 5 so that it defined the time of acceptance rather than the time of payment.

9. Mr. BHALA (United States of America) said that the issue raised by the Observer for Finland had already been dealt with under the Model Law. In the transfer chain, the originator issued a payment order to his bank, which issued a payment order to an intermediary bank. The intermediary bank issued a payment order to the beneficiary's bank, which then paid the beneficiary. Thereafter, under article 17 (2), all the parties would have discharged their obligations. Article 5, however, dealt with a different issue, namely, payment among three banks, which was sometimes referred to as "settlement". If each settlement transfer was treated as a separate transaction, then the parties should be relabelled, so that the beneficiary's bank became the beneficiary of the previous transfer, and so on. In that case, article 17 (2) would still be operative. If the Model Law definitions were applied consistently, no conflict would arise.

10. Mr. CRAWFORD (Canada) said he agreed with the Observer for Finland that a problem existed, and believed that the representative of the United States might have contributed part of the solution. A further contribution could be made by amending article 17 (2) so that obligations could be discharged only where the beneficiary's bank was designated by the beneficiary.

11. In drafting article 5 (b) (ii), the Commission had endeavoured to protect a bank from being required to accept an offer of settlement at a bank where it did not wish to have a credit. If a bank owing settlement transferred funds to another bank designated for that purpose by the bank receiving settlement, the safeguard of a day's delay would not be necessary. He believed that it would be preferable to narrow the scope of paragraph (2) rather than adopt the solution proposed by the Observer for Finland.

12. Mr. GREGORY (United Kingdom) said that a conflict might arise where, in the process described by the representative of the United States, the originator's bank issued a payment order to the intermediary bank and made payment by means of a credit transfer. That transfer would be a separate and subsidiary transaction, in which the originator's bank would become the originator and the intermediary bank would become the beneficiary; if payment was made at another bank, that bank too would become an intermediary. Under article 17 (2), the subsidiary transfer would be completed when the lesser intermediary bank, or the settlement bank, accepted the payment order. Yet under article 5 (b) (ii), the originator's bank would be deemed to have paid the next bank in the chain when credit was made, or when the payee used the

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funds. The draft Model Law thus contained different rules, which could produce different results.

13. Since the primary purpose of article 5 was to enable articles 6 and 8 to operate properly, it might be advisable to insert the phrase "For the purposes of articles 6 and 8" at the beginning of article 5.

14. The CHAIRMAN said that the sole purpose of article 5 was to establish a specific time; it had nothing to do with discharging obligations.

15. Mr. FELSENFELD (United States of America) said that the Commission might not be faced with a problem of inconsistency after all. The opening words of article 5 referred only to the moment when payment of the sender's obligation under article 4 (6) occurred. In that sense, what was involved was clearly a transfer subsidiary to the main credit transfer, with its own time structure; no conflict would arise between the rules of article 4 (6) and those of article 17 (2) because they dealt with two different situations. It might, however, be necessary to treat the subsidiary transfer as a separate transaction, in which case article 17 (2) would apply.

16. Ms. KOSKELO (Observer for Finland) said that she fully supported the representative of the United Kingdom. There was an obscurity in the text which should be removed by amending the chapeau of article 5.

17. Mr. FUJISHITA (Japan) agreed that there was a conflict between article 5 and article 17 (2) which could be resolved by amending the chapeau of article 5. However, that would reopen the debate on article 5, which had already been approved at the previous session. An alternative would be to delete the second paragraph of article 17.

18. Mr. DE BOER (Observer for the Netherlands) agreed with the representative of the United Kingdom that the scope of article 5 was too broad and should be limited to articles 6 and 8.

19. Mr. BURMAN (United States of America) asked whether the Commission could defer its consideration of paragraph (3), since any changes to that paragraph would have to be carefully checked against other articles of the Model Law for consistency.

20. Mr. CHATURVEDI (India) agreed with the representative of the United States that the Commission should not make changes which would materially affect the sender's obligations; it should not adopt paragraph (3) prematurely.

21. Mr. FUJISHITA (Japan) recalled that the representative of Finland had made the proposal to add a phrase at the end of the first sentence of article 17 (1) to ensure that a payment order accepted by the beneficiary's bank was consistent with the payment order issued by the originator both in respect of the indication of the beneficiary and in respect of the amount of payment. He was in favour of that proposal.

22. The CHAIRMAN said that the Commission had addressed that question in connection with article 14.

23. Ms. KOSKELO (Observer for Finland) said that the situation addressed in article 14 was only part of the problem. There were two ways a credit transfer could go wrong: the amount could change on the way - the situation covered in article 14 - or the designation of the beneficiary could be mistakenly changed, so that the final beneficiary bank was not the beneficiary designated by the originator. In such a situation the credit transfer could not be considered to have been completed. There was no provision in the current text of the Model Law to deal with that problem.

24. Mr. CRAWFORD (Canada) said that that idea was embodied in article 7 (2), concerning the obligation to issue a payment order consistent with the contents of the payment order received by the receiving bank and containing the instructions necessary to implement the credit transfer. That idea was also reflected in article 17 (1). Unless every bank in the chain performed the duty laid down in article 7 (2), the transfer was not complete. Nevertheless, the Finnish proposal posed no major problem.

25. Mr. BURMAN (United States of America) said that the matter seemed to be a drafting issue which could perhaps be referred to the Drafting Group.

26. The CHAIRMAN suggested that the Commission should adopt the Finnish proposal; no one could maintain that a payment order accepted by a beneficiary bank other than the bank designated by the sender was complete.

27. Mr. BURMAN (United States of America) asked what would happen in the event of a late payment order if the Finnish proposal was adopted.

28. Ms. KOSKELO (Obsever for Finland) said that a credit transfer should be considered to be complete when a beneficiary bank accepted a payment order consistent with the payment order of the originator. The existence of a delay would be determined by the provisions governing the time of execution, not the contents of the payment order from the originator. It was important to make that clarification in article 17 (1).

29. Mr. BHALA (United States of America) said he thought that the Finnish proposal might in itself create problems. For example, the beneficiary's bank would not necessarily know what had been said in the original payment order, giving rise, yet again, to a matching problem.

30. The CHAIRMAN said that the beneficiary's bank, when it received an accepted payment order, never knew whether it was consistent with the order issued by the originator's bank. The Finnish proposal should be dealt with by the Drafting Group, which should ensure that the Model Law clearly stipulated that no one could consider a credit transfer to have been completed if a payment order had been accepted by a bank other than the beneficiary bank designated by the originator.

31. Mr. CHATURVEDI (India) said that his delegation fully supported the suggestion made by the Observer for Finland. The problem was not merely a drafting problem; it was essential that a payment order that was accepted should be consistent with the payment order of the sender.

32. Ms. KOSKELO (Observer for Finland) said that she was not insisting on the actual wording of her proposal. The amendment could indicate that a payment order accepted by the beneficiary bank must be for the benefit of the beneficiary defined as the person designated by the originator.

33. Mr. DE BOER (Observer for the Netherlands) said that he could accept that wording.

34. Mr. GREGORY (United Kingdom) said that the original proposal by the Observer for Finland would have addressed both the problem of a payment received by the wrong bank that was not completed because the amount was too small and the problem of a payment order accepted by the wrong beneficiary bank.

35. Mr. BURMAN (United States of America) said that his delegation would not object to the addition of the words "for the benefit of the beneficiary".

The meeting was suspended at 4.35 p.m. and resumed at 5 p.m.

36. Mr. SCHNEIDER (Germany) said that paragraph (3) of article 17 dealt with the underlying obligation between the originator and the beneficiary but that the Commission had yet to decide whether it wanted any rules on the underlying obligation in the Model Law.

37. The CHAIRMAN questioned whether paragraph (3) had anything to do with the underlying obligation.

38. Mr. PELICHET (Observer, The Hague Conference on Private International Law) explained that the reference to "the applicable law" was in fact a reference to the underlying obligation. He proposed that that reference should be made explicit by adding the words "governing the underlying obligation" after the phrase "the applicable law".

39. Mr. CHATURVEDI (India) wondered whether it might not be better to add the word "service" before the word "charges" in the second sentence.

40. The CHAIRMAN said that the Model Law did not deal with service charges. Customary practice in international banking allowed banks to deduct from transfers the amount of any charges. The deduction of such charges could not invalidate the transaction.

41. Mr. CHATURVEDI said that he had meant to stipulate that the bank should be entitled to deduct service charges only, and not other costs.

42. Mr. GREGORY (United Kingdom) said it was understood that the charges were for the transfer; consequently, there was no need to add "service". Indeed, that might only generate more debate. However, he welcomed the addition proposed by the Observer for The Hague Conference.

43. Mr. BURMAN (United States of America) said that his delegation supported that proposal. However, the completion of the credit transfer might have results pertinent to paragraphs (1) and (2). Care should be taken in drafting to preserve any rights or obligations that might flow from the completion of the credit transfer.

44. Mr. CRAWFORD (Canada) expressed his support for the changes proposed by the Observer for The Hague Conference.

45. Mr. DUCHEK (Austria) said that the second sentence of paragraph (3) might give the wrong impression. It obviously concerned to the relationship between the originator and the beneficiary, but in specifying certain rights that could not be prejudiced, it might preclude other rights. During the previous day's discussion on liability, it had been made clear that if, under the law applicable to the underlying obligation, a beneficiary was entitled to ask an originator for compensation for any damage resulting from a delay in payment, that right was not influenced by the Commission's rules. Likewise, the rights involved in the situation described in article 17 (3) were not necessarily influenced by the Model Law.

46. Mr. VASSEUR (Observer, Banking Federation of the European Community) said that he was ill at ease with paragraph (3), as it dealt with two quite different matters. The first sentence was concerned with the completion of the credit transfer and the second with cost-sharing. He supported the suggestion put forward by the Observer for The Hague Conference, since the "applicable law" must certainly be the law applicable to the underlying obligation. The sharing of costs between the beneficiary and the originator, however, was not governed by any such law, but only by agreements between the two parties. That difficulty could be avoided by adding wording such as "and of the agrements concluded between the beneficiary and the originator" after the phrase "applicable law".

47. Given that paragraph (3) was an amalgam of two different subjects, the second sentence was in fact inappropriate and should be deleted. It would be appropriate only if the Model Law contained specific provisions regarding cost-sharing, which it did not.

48. Mr. SAFARIAN NEMAT-ABAD (Islamic Republic of Iran) said that he supported the proposal made by the Observer for The Hague Conference, which would help clarify the text.

49. Mr. GREGORY (United Kingdom) said that paragraph (3) was a supplementary rule intended to clarify paragraph (1) by stipulating that a credit transfer

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was complete even though charges might have been deducted. It was not meant to address the question of whether such charges could be deducted.

50. He did not fully understand the remark by the representative of the United States that the rights and obligations specified in the Model Law needed to be preserved. The Model Law did not deal with the right of the beneficiary to recover charges from the originator, and he wondered which rights and obligations did need to be preserved.

51. The representative of Austria had expressed concern that the reference to the right of the beneficiary to recover charges from the originator might implicitly exclude other rights of the beneficiary vis-à-vis the originator in different situations. However, the Model Law was clear on that point. Perhaps the second sentence should be amended to ensure that it followed on clearly from the first. It was the rule contained in the first sentence which should not prejudice the right of the beneficiary to recover charges, rather than the completion of the transfer itself.

52. With regard to the proposal by the Observer for the Banking Federation of the European Community that reference should be made to any agreements under which charges might be payable, it was sufficient to refer to the applicable law governing the underlying transaction, since any agreement which failed to comply with that law would not be valid.

53. Mr. EFFROS (Observer, International Monetary Fund) was concerned that, under the provisions as they stood, a beneficiary receiving less than the full amount of a transfer would have an excuse for breaking his contract, while the originator would not know if the full amount required had been delivered until it was too late. The rule appeared to protect banks, while failing to take into account the greater interests of customers. It would be better to specify that the amount originally sent should always be delivered and that any unanticipated charges could be referred back through the chain of banks involved in the transaction and charged to the originator.

54. Mr. BHALA (United States of America) felt that the matter should be kept in perspective, given that the sums concerned were insignificant. There was a general consensus that, if charges were deducted, the beneficiary's right to recover those charges should not be prejudiced. In the interests of clarity, the drafting amendment proposed by the Observer for The Hague Conference should be included, but there was no need for extensive redrafting of the provision at the present late stage.

55. Mr. AL-NASSER (Saudi Arabia) agreed with the Observer for the Banking Federation of the European Community that it was not appropriate to include paragraph (3) in article 17. It would be preferable to include it as the second paragraph of article 14.

56. Mr. LIM (Singapore) said that the point made by the representative of Austria was a valid one. The principle of consistency in the drafting of the

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Model Law was very important. The rights of the parties in the underlying transaction were not expressly preserved in other parts of the Law, and to do so in article 17 might lead to difficulties of interpretation.

57. Article 17 was confusing in that it dealt with both the completion of the credit transfer and the underlying transaction. He agreed with the representative of Germany that paragraph (3) might appear to refer to the underlying transaction rather than the completion of the transfer. While the problem was one of drafting, the need for consistency was paramount.

58. Mr. EL-SHARKAWY (Egypt) proposed that the words "under the applicable law" in paragraph (3) should be deleted, since there was some confusion as to what they actually meant. He felt that there was no need for the Model Law to provide for the beneficiary's right to recover charges from the originator at all, since it was covered by the general principles of law.

59. Mr. ZHAO Chengbi (China) said that, as article 17 (3) would prejudice other articles, there was a need for greater consistency.

60. Mr. CHATURVEDI (India) said that he supported the proposal made by the Observer for the International Monetary Fund (IMF), since he felt that paragraph (3) might seriously jeopardize international contracts. The paragraph should therefore be revised.

61. The CHAIRMAN noted that there was a substantial divergence of views on the question. However, there did seem to be a general consensus in support of the proposal made by the Observer for The Hague Conference. He therefore suggested that the Drafting Group should be asked to insert the words "governing the underlying obligation" after the words "the applicable law" in paragraph (3).

62. It was so decided.

63. Mr. PELICHET (Observer, The Hague Conference on Private International Law) said that the observer for IMF had raised an important point which the Commission ought to discuss.

64. The CHAIRMAN said that he did not feel that the remarks made by the Observer for IMF were a source of concern to delegations. In his view, the sums concerned were so small that they could scarcely be considered valid justification for breaking a contract.

65. Mr. CRAWFORD (Canada) said that emphasis should be placed on the distinction between the completion of the credit transfer as an abstract exercise and the discharge of the underlying obligation. Paragraph (3) did not aim to extinguish that obligation, and there was no need to amend it in order to achieve the result desired by the Observers for IMF and The Hague Conference.

The meeting rose at 5.55 p.m.